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No. 04-467

IN THE

Supreme Court of the United States

PEARSON EDUCATION, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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PETITIONER'S REPLY TO OPPOSITION FOR WRIT OF CERTIORARI

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Respondent, National Labor Relations Board ("NLRB" or "Board"), filed its brief in opposition to Pearson Education, Inc.'s ("Pearson") Petition for Writ of Certiorari on December 22, 2004. Pearson, which previously has provided an accurate Rule 29.6 statement (Pet. at ii), now responds to points raised by the NLRB.

I. Contrary to the NLRB's view, this case does raise important questions about the interpretation of the First Amendment and Section 8(c) of the National Labor Relations Act. At issue is the appropriate test to be applied when analyzing whether an employer communication is entitled to the broad protections of the First Amendment.

The NLRB argues that Section 8(c) of the National Labor Relations Act, 29 U.S.C. § 158(c) ("Act"), which incorporates the First Amendment into that Act, specifically prohibits "threats of reprisal," and because both the Board and the Appellate Court found the leaflet to be a threat, that ends the matter and thus, no First Amendment question is raised. That superficial analysis begs the question, and accepting it at face value would mean that the NLRB could run roughshod over an employer's First Amendment rights simply by labeling a communication as a "threat."

During a union organizing campaign, an employer is entitled to the full protection of the Constitution's First Amendment with one limited exception. Section 8(c) prohibits a "threat of reprisal," which given its commonly understood meaning, means that an employer cannot tell its employees it will take an adverse action against them in retaliation for their support of a union. *See NLRB v. Golub Corp.*, 388 F.2d 921, 928 (2d Cir. 1967). No such statement was made in the instant case. Instead, Pearson's predecessor, Macmillan, told employees in the leaflet that, through the collective bargaining process, there was a risk that the wages they would have at the end of that process could be less. It is well established that such statements are a legitimate description of the collective bargaining process.

The NLRB cited *Flamingo Hilton-Laughlin*, 324 NLRB 72, 111 (1997), for the proposition that a message that a previously announced wage increase would probably be lost if the union won constitutes employer coercion. (Bd. Br. at 9) In

that case, however, the employer made a series of reprisal statements, including *affirmatively* stating that a previously announced wage increase likely *would be withheld* if the union won. Macmillan's leaflet did not say, unlike the employer in *Flamingo-Hilton*, that the Company would probably withhold the scheduled wage increase if the union won.

In fact, the NLRB acknowledges Pearson's point that the leaflet conveyed a message about the risk of bargaining, but the Board also contends the leaflet conveyed the message that employees would not get the increase unless the union could negotiate it back. (Bd. Br. at 10-11)[1] Once again, that is not what Macmillan's leaflet said. The leaflet did not state, "and if you vote for the union, we won't give you the wage increase as scheduled," nor did it state that "we will only give you that portion of the scheduled wage increase that the union is able to negotiate." It stated that, because all wages and benefits were subject to negotiation, no one could predict what the final wage package would be.[2]

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[1] The NLRB seeks to distinguish *Technology Service Solutions*, 332 NLRB 1096 (2000), *inter alia*, on the basis that the employer assured employees a newly granted wage increase would be left in place regardless of how the election turned out while "merely advising of the possibility that the collective bargaining process might *later* result in an agreement to lower wages." (Bd. Br. at 11 n.3) Here, as noted, the leaflet did *not* state that Macmillan would not leave the scheduled wage increase in place. Furthermore, that case illustrates Pearson's other First Amendment argument on the importance of considering the context of a challenged communication. Macmillan's President had told employees in group meetings that they would get the scheduled wage increase regardless of how the election turned out. If it was acceptable for the employer in *Technology Service Solutions* to "merely advise" employees about the possibility that collective bargaining might later result in an agreement to lower their wages, which would include the scheduled increase, it was equally acceptable under Section 8(c) for Macmillan to do so.

[2] The Board cites *Advo System, Inc.*, 297 NLRB 926 (1990) and *Arrow Elastic Corp.*, 230 NLRB 110 (1977), *enforced* 573 F.2d 702 (1st Cir. 1978), for the proposition that a promised wage increase must be awarded

To allow the NLRB to label an employer communication as a "threat of reprisal" for statements it did not make is a clear violation of an employer's First Amendment rights. This Court should address the important constitutional issue of the appropriate standards to be applied when the NLRB analyzes whether an employer communication falls outside the broad protections of the First Amendment.

II. The leaflet was the sole basis upon which the Court of Appeals sustained the bargaining order. Thus, contrary to the NLRB's argument, context and surrounding circumstances were not considered before determining that the leaflet was a threat of reprisal. Reaching a conclusion on a communication taken out of context is contrary to an employer's important First Amendment rights.

As Pearson noted, this case also raises the important constitutional issue of whether the government violates an employer's broad First Amendment rights when it interprets a single communication (that is but one part of a continuum of communications on the same issue) in isolation and out of context as a "threat of reprisal" and not constitutionally protected free speech. The NLRB contends that surrounding

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even if the union wins an election. (Bd. Br. at 9) First, Macmillan's leaflet never said that it would not give the wage increases as scheduled. Furthermore, in both of those cases, the Board also relied on the proposition that during an election campaign an employer should act as if the union were not in the picture. *Advo*, 297 NLRB at 940; *Arrow Elastic*, 230 NLRB at 113. Significantly, this is the very proposition that the Court of Appeals specifically rejected in this case in its first decision denying enforcement of the Board's bargaining order. The Court of Appeals stated "[t]here is no such principle governing employer communications during election campaigns, and we doubt that there could be in light of the First Amendment." (Pet. App. at 48a) The Court of Appeals found that the Regional Director's rationale was the "antithesis of reasoned decisionmaking, and as such was arbitrary and capricious." (Pet. App. at 49a)

circumstances were considered and found to corroborate the coercive nature of the leaflet. (Bd. Br. at 11) The information upon which the NLRB relies, however, dealt with an entirely separate objection made by the Union upon which the Court of Appeals did not rule. The Board found the Union's objection to Macmillan's one-page leaflet was "independently sufficient to set aside the election." (Pet. App. at 20a) The Court of Appeals agreed and thus stated, "we do not need to reach the additional allegations of objectionable conduct by the Company." (Pet. App. at 9a)

Thus, as to the issue in this case, the one-page leaflet, neither the Board nor the Court took into account context and surrounding circumstances. A significant First Amendment issue is raised when the government determines that a communication is unlawful without even considering the context and circumstances of the communication. Here, other communications from Macmillan talked about the unpredictability of the collective bargaining process. Furthermore, the Company President told employees that they would get the wage increase irrespective of how the election turned out. A Human Resource representative also told employees that, if a wage increase had been promised by the President, it would become part of the wage baseline from which negotiations began. Further ignored was the important fact that just days before Macmillan's leaflet, the Union had issued a written communication from it's lawyer stating that a) Macmillan could withhold the wage increase if the Union lost and further, b) that if the Union won, it would be unlawful for Macmillan to withhold the wage increase. Macmillan's leaflet legitimately responded to those points made by the Union's letter. All of this evidence is highly relevant context to the subsequent leaflet and was not considered in making the determination that it was a threat.

An employer's First Amendment right is illusory if its communication can be isolated from all other relevant context and then be found unlawful.

III. Significant changed circumstances can have a substantial impact on individual employees' Section 7 self-determination rights, which form the foundation of national labor policy, and changed circumstances have not been addressed by the Court for half a century.

Finally, the NLRB contends that no court has adopted Pearson's argument on changed circumstances. That may be true, but it is unclear whether a case raising the issue in the context presented by this one has ever been addressed by a court of appeals. Furthermore, and importantly, very little has been said by this Court on changed circumstances and employees' Section 7 rights, and the primary case that addressed them, *Brooks v. NLRB*, 348 U.S. 96 (1954), is over 50 years old.

Because it is well recognized that employees' Section 7 right of self-determination is the foundation of the Nation's labor policy, clearly an important issue of federal law is presented by the question of when changed circumstances and those Section 7 rights should be trumped by a certified bargaining unit. Pearson pointed out that in a variety of other circumstances the NLRB has had no difficulty in finding bargaining units to no longer be appropriate because of changed circumstances that had occurred since the Board certified the unit. (Pet. at 19-20)

The NLRB unconvincingly tries to brush off its prior decisions relied upon by Pearson. (Bd. Br. at 14 n.7) The fact remains that in each of those NLRB decisions, the Board held that the employer was no longer required to bargain with the union because changed circumstances that had occurred since the time the Board certified the unit made the unit no

longer appropriate. No compelling reason is offered as to why significant changed circumstances over the course of several years (the majority of which occurred *after* the second election) could not also make the certified unit here no longer appropriate. Dissenting Board Member Hurtgen agreed with Pearson that at a minimum, the record should have been reopened to take evidence on the changed circumstances. (Pet. App. 17a-18a)

Furthermore, in bargaining order cases under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), several appellate courts have recognized that changed circumstances can make a remedial bargaining order inappropriate because of an "obvious danger that a bargaining order that is intended to vindicate the rights of past employees will infringe upon the rights of the current ones to decide whether they wish to be represented by a union." *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1078 (D.C. Cir. 1996). *See also HarperCollins San Francisco v. NLRB*, 79 F.3d 1324, 1333 (2nd Cir. 1996). The Board acknowledges that appellate courts have considered changed circumstances in *Gissel* bargaining order cases (Bd. Br. at 15) but contends no court has adopted the position argued by Pearson.[3] This Court, however, has not had occasion to address the important issue of changed circumstances in non-*Gissel* bargaining order cases such as the instant one. The interplay among employees' Section 7 rights, federal labor policy, and changed circumstances is highly worthy of being addressed and clarified by this Court.

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[3] The Board cites cases for the proposition that change in ownership *itself* or employee turnover itself have no impact on a union's certification. Maybe so, but Pearson does not rely on a single isolated change, but a multitude of changes that collectively should be analyzed.

CONCLUSION

For all the reasons articulated above, Pearson Education prays that this Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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